TETUAN C SUKUMARAN & CO v. BANK SIMPANAN NASIONAL

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[CIVIL APPEAL NO: WA-12BNCvC-106-12-2021]
5 SEPTEMBER 2022

Abstract – *A banker owes its customer a duty to take reasonable care and skill in acting in accordance with the customer's mandate. Not acting according to the customer's mandate amounts to acting without the authority of the customer. The bank is negligent and in breach of its duty when it does not seek verification from an authorised person before executing transfer of funds, which leads to the transferring of monies to the account of a person who has no right to receive the funds. In such scenario, the bank has acted in violation of its customer's mandate.*

BANKING: *Banker and customer – Duty of care – Negligence – Reasonable care and skill in acting in accordance with customer's mandate – Whether breached – Whether bank ought to verify each letter of instruction with operator of account before executing transfer of funds – Whether bank acted on its own detriment by relying on verification of unauthorised person for transfer of funds – Whether conduct of bank violation of customer's mandate – Whether there was contributory negligence on customer's part – Whether statutory protection under s. 73A of Bills of Exchange Act 1949 applicable to defeat customer's claim*

TORT: *Negligence – Banker and customer – Duty of care – Negligence – Reasonable care and skill in acting in accordance with customer's mandate – Whether breached – Whether bank ought to verify each letter of instruction with operator of account before executing transfer of funds – Whether bank acted on its own detriment by relying on verification of unauthorised person for transfer of funds – Whether conduct of bank violation of customer's mandate – Whether there was contributory negligence on customer's part – Whether statutory protection under s. 73A of Bills of Exchange Act 1949 applicable to defeat customer's claim*

This was an appeal by the plaintiff, suing as a firm, against the decision of the Sessions Court dismissing its claim against Bank Simpanan Nasional, the first defendant, after a full trial. The plaintiff had opened a corporate account with the first defendant, a bank, wherein one Malcolm Fernandez ('Malcolm') was the account operator and authorised signatory. In 2017, transfers of funds were allowed to be made online using RENTAS. The plaintiff agreed to use the RENTAS method which involved transferring funds from the said account to one of its other accounts in Maybank. On 16 November 2018, Malcolm realised something was amiss when he queried an employee of the plaintiff, the second defendant, about certain monies

concerning a client. Upon further investigation, copies of the plaintiff's statements of account for January until October were requested from the first defendant. It was then discovered that 31 withdrawals had been made from the account amounting to RM604,669 between the period of 2 January 2018 and 31 October 2018, to an account in Maybank in the name of the second defendant. It was then discovered that two more such withdrawals were made in December 2017 making a total of RM626,969 withdrawn from the account. Malcolm, in a meeting with SD1, the Unit Head of the RENTAS transactions, alleged that he did not issue the said letters of instruction and his signature on each of the said letters were forgeries. SD1 denied any wrongdoing on the part of the first defendant and said that the transfers were made after obtaining verification from one 'Ain' from the plaintiff's office. In the meantime, the second defendant absconded and police reports were lodged by the plaintiff concerning the fraud. The second defendant was subsequently arrested and convicted on a charge under s. 408 of the Penal Code. Evidence pointed to the second defendant committing the fraud by forging Malcom's signature on the letters of instruction for the transfer of funds into her own personal account. The plaintiff commenced an action for negligence against the first defendant and for fraud against the second defendant. The second defendant chose not to contest the claim and judgment was accordingly entered against her. The plaintiff claimed that the first defendant owed a duty of care to it as its customer and had breached that duty of care. It was alleged that the first defendant, *inter alia*, (i) failed to obtain the original letters of instruction for the RENTAS transfers to the second defendant's account; (ii) failed to obtain verification by telephone from Malcolm who was purportedly alleged to have signed the said letters of instruction; (iii) failed to inform the plaintiff and/or make inquiries or verification of the existence of the letters of instruction for the RENTAS transfer. The first defendant raised three defences, namely, (i) that there was no breach of duty of care as the transfer of funds were properly made in accordance with RENTAS; (ii) there was contributory negligence as the plaintiff failed to detect the unauthorised withdrawals of its own employee, the second defendant, which took place during the span of 10 months; and (iii) the protection accorded by s. 73A of the Bills of Exchange Act 1949 ('BEA'). The Sessions Court Judge ('SCJ'), in dismissing the claim for negligence, found that the first defendant had proved that it did not breach its duty of care to the plaintiff and that the plaintiff had negligently contributed to the forgery of the signature appearing on the letters of instruction. Hence, this appeal. The issues that arose were (i) whether the first defendant had breached its duty of care to the plaintiff and if it had then whether there was contributory negligence on the plaintiff's part; and (ii) whether the statutory protection under s. 73A of the BEA was applicable to defeat the plaintiff's claim.

Held (allowing appeal):

(1) A banker owes its customer a duty to take reasonable care and skill in acting in accordance with the customer's mandate. Not acting according to the customer's mandate would be an act of acting without authority of the customer. In this case, the first defendant had an obligation to inform the customer/operator of the account of the transfer. Since an operator of the account had been named by the plaintiff, which was a partnership, only the operator named by the partnership must be informed. The mandate of the customer as well as cl. 4 of the RENTAS procedure was clearly not complied with by the officers of the first defendant when allowing the RENTAS transfers to be made. (paras 24, 27 & 28)

(2) The persons who can verify cheques or transactions apart from the authorised signatories or operators of the account can be other persons so long as these persons are expressly named as authorised representatives in the customer's mandate. Thus, any verification against the customer's mandate is meaningless. 'Ain' was not an authorised representative. The plaintiff did not authorise her for anything. The first defendant acted to its own detriment by relying on verification made by an unauthorised person although that person may be a staff or even a partner of the plaintiff's organisation. (paras 34 & 35)

(3) The SCJ held that from the series of RENTAS transfers, the plaintiff had represented to the first defendant that 'Ain' was authorised to act for the plaintiff. The 'representation' the first defendant sought to establish was the exception to absolute liability under s. 24 of the BEA. But the plaintiff was not relying on s. 24 of the BEA. It was relying on the tort of negligence where the duty was on the first defendant to verify each letter of instruction for the RENTAS transfer with the operator of the account before executing the transfer. This the first defendant failed to do as it turned to Ain, a person not authorised by the plaintiff to verify the RENTAS transfer sought in each letter of instruction for the RENTAS transfer. The conduct of the first defendant was a violation of the customer's mandate and cl. 4 of the RENTAS procedure. (paras 36 & 37)

(4) The first defendant was in breach of its duty when it did not seek verification from the authorised person. Seeking verification from any other person including the other partners or staff was against the customer's mandate. The mandate was created to protect the plaintiff even from forgery and fraud committed by persons within the organisation. Had the verification been sought from the authorised person as mandated, the fraud perpetrated by the second defendant would have been discovered. Any prudent and reasonable banker would

have complied with the mandate of its customer. Thus, the finding of no breach of the duty of care by the SCJ, when the mandate of the customer was not complied with, was plainly wrong and warranted appellate interference. The first defendant was negligent in transferring the funds to the account of the second defendant who had no right to receive the funds. The decision of the SCJ was accordingly set aside. The first defendant was held negligent for transferring the monies against the customer's mandate and its own RENTAS procedures. (paras 41 & 42)

(5) The plaintiff, on a balance of probabilities, was liable for failing to take care so as to avoid damage to itself. Had reasonable steps been taken as a prudent and cautious employer, such as auditing its accounts or having a proper system concerning its bank accounts and proper supervision of the second defendant, the plaintiff would have at an early stage detected the unauthorised withdrawals or fraud committed by the second defendant. The fact that the fraud went undetected for ten months speaks for itself. The account was also not a passive account as the plaintiff was alleging. Evidence showed that apart from the RENTAS transfers, monies were also credited into the account on a regular basis. The plaintiff appeared to have been rather lax in exercising its supervision in respect of its financial affairs. The defendant had proven the defence of contributory negligence. This court apportioned liability between the parties on a 30:70 basis. (paras 43 & 44)

(6) Section 73A of the BEA applies only in the instance of a cheque that is forged and therefore the protection did not avail to the first defendant. The letter of instruction in the present appeal for each RENTAS transfer was not a cheque. Since s. 73A of the BEA was wrongly held applicable, it followed that the finding that the first defendant was protected by the section could not be justified in law. Appellate intervention was thus warranted. (paras 45, 52 & 56)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Bank of Montreal v. Dominion Gresham Guarantee And Casualty Co [1930] AC 695 ***(refd)***

Brown v. Westminster Bank Ltd [1964] 2 LLR 187 ***(refd)***

Development & Commercial Bank Bhd v. Liew Weng Hang & Ors [2007] 6 CLJ 260 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Greenwood v. Martins Bank Ltd [1993] AC 51 ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Leolaris (M) Sdn Bhd v. RHB Bank Bhd [2009] 10 CLJ 248 HC ***(refd)***

London Joint Stock Bank Ltd v. Macmillan [1918] AC 777 ***(refd)***

Majuikan Sdn Bhd v. Barclays Bank Plc [2014] 9 CLJ 337 CA ***(refd)***

ML Breadworks Sdn Bhd v. Malayan Banking Bhd [2013] 1 CLJ 833 HC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Prima Nova Sdn Bhd v. Affin Bank Bhd [2014] 9 CLJ 442 CA ***(refd)***

Redmond v. Allied Irish Bank Plc [1987] FLR 307 ***(refd)***
RHB Bank v. L & R Holdings Sdn Bhd & Anor [2011] 4 CLJ 369 CA ***(refd)***
S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors [2019] 1 LNS 93 CA ***(refd)***
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] 1 AC 80 ***(refd)***
Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd And Others [1985] 2 All ER 947 ***(refd)***
Tina Motors Pty Ltd v. Australia & New Zealand Banking Group Ltd [1977] VR 205 ***(refd)***
United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 3(1), 24, 73(1), 73A
Penal Code, s. 408

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For the respondent - Ravichandaran Selliah; M/s S Ravichandaran & Anuar

[Editor's note: Appeal from Sessions Court; Suit No: WA-B52-10-01-2020.]

Reported by Suhainah Wahiduddin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This is an appeal by Tetuan C Sukumaran & Co, suing as a firm, against the decision of the Sessions Court dismissing its claim against Bank Simpanan Nasional after a full trial. The claim was for damages founded on negligence when transferring funds from the corporate account the firm had with the bank *vide* the Real-time Electronic Transfer of Funds and Securities System (RENTAS) method.

[2] Hereinafter, the parties are referred to as they were in the court below. The plaintiff, Tetuan C Sukumaran & Co, is a legal firm which at the material time a customer of Bank Simpanan Nasional, the first defendant. The plaintiff's former employee, Surya Ningsih binti Masbanih was the second defendant.

[3] On 21 June 2022, I allowed the appeal and set aside the decision of the court below. Liability was apportioned between the parties on a 30:70 basis on the ground of contributory negligence. The first defendant was ordered to pay RM438,878.30 with interest at 5% from the date of filing the writ until full and final settlement. This judgment contains the full reasons for my decision.

The Background Facts

[4] The background facts are largely not in dispute. The plaintiff had opened the corporate account with the first defendant wherein Malcolm Fernandez and two other partners, Norman Joseph Fernandez and Mohd

Nor Zabidin were the account operators and the authorised signatories. Specimen signatures of all three account operators were kept by the first defendant. However, the plaintiff had informed the first defendant by letter dated 9 May 2013 that the mandate to operate the account is given solely to Malcolm Fernandez. At that point in time, physical attendance at the bank was necessary to carry out transactions as the first defendant did not offer the service of cheques.

[5] In 2017, transfers of funds were allowed to be made online using RENTAS. The plaintiff agreed to use the RENTAS method after a trial run held on 2 October 2017 which involved transferring funds from the said account to one of its other accounts in Maybank. The transfer of funds using the RENTAS method was basically done as follows (omitting the internal procedures of the first defendant involving approval 1 and approval 2 stages): (i) the plaintiff would send a letter of instruction for transfer of funds signed by the account operator; (ii) the first defendant would through its employee make a telephone call to the said account operator, Malcolm Fernandez, to verify the transaction; (iii) upon verification, the transaction would be approved resulting the account being debited for the appropriate sum and transferred to the recipient account. Thereafter, the second transfer using RENTAS was made on 18 December 2019, the third transfer on 26 December 2017 until the 35 transfers on 31 October 2018, which was the last transfer.

[6] On 16 November 2018, Malcolm Fernandez realised something was amiss when he queried the second defendant about certain monies concerning a client. On further investigation and suspecting foul play, copies of the plaintiff's statements of account for January until October were on 19 November 2018 requested from the first defendant. On receiving the said statements, it was discovered that 31 withdrawals had been made from the account amounting to RM604,669, between the period of 2 January 2018 and 31 October 2018, to an account in Maybank which was in the name of the second defendant. Upon further investigation, it was discovered that two more such withdrawals were made in December 2017 making a total of RM626,969 withdrawn from the account.

[7] On obtaining the letters of instruction authorising the 33 transfers of funds from the first defendant, Malcolm Fernandez in a meeting with Nor Azlinda binti Zulkifli (SD1), the unit head of the RENTAS transactions at the material time, alleged that he did not issue the said letters of instruction and his signature on each of the said letters were forgeries. SD1 denied any wrongdoing on part of the first defendant and said that the transfers were made after obtaining verification from one "Ain" from the plaintiff's office.

[8] In the meantime, the second defendant absconded on the same day the statement of accounts was requested from the first defendant. Three police reports were lodged by the plaintiff concerning the fraud. The second

defendant was subsequently arrested and convicted on a charge under s. 408 of the Penal Code. The evidence points to the second defendant committing the fraud by forging Malcolm Fernandez's signature on the letters of instruction for the transfer of funds to into her own personal account in Maybank.

[9] On 24 January 2020, the plaintiff commenced an action for negligence against the first defendant and for fraud against the second defendant. The second defendant chose not to contest the claim and judgment were accordingly entered against her.

The Claim And The Defence

[10] The plaintiff claimed that the first defendant owed a duty of care to it as its customer and had breached that duty of care. The particulars of the breach of duty of care pleaded can be summarised as follows. It was alleged that the first defendant:

(i) failed to obtain the original letters of instruction for the RENTAS transfers to the second defendant's account;

(ii) failed to obtain verification by telephone from Malcolm Fernandez who is purportedly alleged to have signed the said letters of instruction;

(iii) failed to examine two letters of instruction dated 26 October 2017 which was substituted by a letter dated 26 December 2017 purportedly signed by Malcolm Fernandez for the RENTAS transfer; and

(iv) failed to inform the plaintiff and/or make inquiries or verification of the existence of the letters of instruction dated 26 October 2017 which was substituted by letter dated 26 December 2017 for the same RENTAS transfer.

[11] From all the particulars of breach of duty of care pleaded, I only found the failure of verifying from the only authorised account operator, Malcolm Fernandez, the authenticity of the transfer before executing the RENTAS transfer of very critical. This breach of the duty of care, if proven, would establish the plaintiff's claim as it is the cause of the plaintiff's loss.

[12] The first defendant raised three defences. The first was that there was no breach of the duty of care as the transfer of funds were properly made in accordance with RENTAS. It was pleaded that the first defendant had received letters of instruction either by e-mail or fax signed by Malcolm Fernandez authorising the transfer of funds to the second defendant's account in Maybank and that "Puan Ain" from the plaintiff's office had on each occasion verified each transfer. It was pleaded that "Ain" was authorised to verify any transfer of funds from the said account.

[13] The second defence was contributory negligence. It was pleaded that the plaintiff failed to detect the unauthorised withdrawals by its own employee, the second defendant, which took place during the span of ten months. It was stated that had reasonable steps been taken of checking the monthly transactions statements, auditing its accounts or having a proper system concerning its bank accounts and proper supervision of the second defendant the plaintiff would have at an early stage detected the unauthorised withdrawals or fraud committed by the second defendant.

[14] The third defence was the protection accorded by s. 73A of the Bills of Exchange Act 1949 ("BEA"). In this regard, it must be said that the statement by the learned Sessions Court Judge that counsel conceded that s. 73A of the BEA was applicable is not correct. The submission of counsel was two-prong: (i) that the section was not applicable as it only protects the bank when cheques are drawn on the account which is not the case before the court; and (ii) in the event the section was applicable the elements therein were not proven. For reasons that would become clear, I did not have to consider the latter submission.

The Decision Of The Court Below

[15] In the court below, it was common ground that the first defendant as a bank owed a duty of care to its customers. The learned Sessions Court Judge found that the first defendant had on a balance of probabilities proved that it did not breach its duty of care to the plaintiff. This was the first ground on which the claim for negligence was dismissed.

[16] The second ground was that the first defendant had on a balance of probabilities proved that the plaintiff had negligently contributed to the forgery of the signature appearing on the letters of instruction and therefore the plaintiff was not entitled to rely on the fact that Malcolm Fernandez's signature was forged on each of the said letters of instruction. The learned Sessions Court Judge accordingly held that the first defendant was entitled to rely on the exception provided in s. 73A of the BEA to escape the absolute liability. The exception is a deeming provision where the forged signatures are deemed to be the signature of the authorised signatory.

The Law On Appellate Intervention

[17] In considering this appeal, I kept in mind the following established principles: an appellate court should be slow to interfere with the findings of fact of a trial court unless the findings were arrived at with no or insufficient judicial appreciation of the evidence before it to render such findings plainly wrong; or the findings were the result of misdirection by the trial court on the applicable law or there was a wrong application of the law to the facts; or the findings were of a kind which a reasonable court similarly circumstanced, which had properly directed itself and asked the right questions, would not have arrived at (see: *Ng Hoo Kui & Anor v. Wendy Tan*

Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1; *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[18] It has been pronounced that when considering the contention that there was no judicial appreciation of the evidence the standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. The standard does not concern the degree of confidence felt by the appellate court that it would have reached the same conclusion as the trial judge or the degree of certainty that the appellate court considered that it would have reached a different conclusion. The only question is whether the decision under appeal is one that no reasonable judge could have reached. Thus, the plainly wrong test ought not to be used by the appellate court as a means to substitute the impugned decision with its own. (see: *Ng Hoo Kui (supra)* and *S Quarry Sdn Bhd v. Desaru Development Corporation Sdn Bhd & Ors* [2019] 1 LNS 93; [2019] 6 MLRA 350).

The Main Issues

[19] There are two main issues in this appeal. The first issue is whether the first defendant had breached its duty of care to the plaintiff and if it had then whether the plaintiff was contributory negligent. The second issue is whether the statutory protection under s. 73A of the BEA is applicable to defeat the plaintiff's claim.

Whether The First Defendant Breached The Duty Of Care?

[20] Apart from the alleged breach of the customer's mandate to verify from Malcolm Fernandez, the authorised operator of the account, concerning the transfer of funds stated in each letter of instruction, I found the other alleged breaches of duty of care particularised by the plaintiff and mentioned above rightly rejected by the learned Sessions Court Judge.

The Governing Principles

[21] In deciding whether there was a breach of duty of care as stated in the preceding paragraph, I kept in mind the following governing principles on the subject. In an action for negligence by a customer against his bank, one begins with the premise that at the material time there is an underlying contractual relationship between the parties. The bank has a contract with the customer in relation to the account the customer operated with its branch. In *Development & Commercial Bank Bhd v. Liew Weng Hang & Ors* [2007] 6 CLJ 260, Gopal Sri Ram JCA stated the position of the special relationship giving rise to a duty of care as follows:

> This is a special relationship giving rise to a duty of care in the plaintiffs' favour. As Raja Azlan Shah J (as His Royal Highness then was) said in *Mooney & Ors v. Peat, Marwick, Michell & Co & Anor* [1966] 1 LNS 109: *Hedley*'s case (*Hedley Byrne & Co v. Heller and Partners* [1963] 2 All ER 575) is concerned with the proposition that wherever there is a relationship equivalent to contract there is a duty of care, and the relationship may

A be either of a general character, for example, the relationship of solicitor and client or of banker and customer, or of a particular character created *ad hoc*.

[22] in this regard, Lord Scarman speaking for the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd And Others* [1985] 2 All ER
B 947 held that in a banker and customer relationship, the parties' mutual obligations in tort cannot be any greater than those to be found expressly or by necessary implication in their contract.

[23] In the book entitled *Law of Banker and Customer Fourth Edition,* the learned author Poh Chu Chai said: inherent in the mandate of a customer is
C the duty of a banker to carry out the mandate with reasonable care. The learned author further stated that when the bank performs its duty to cause payment to be made on behalf of its customers the bank must strictly comply with the customers' instructions. The bank must also ascertain that it has the authority to make payment and in addition to that, it must ensure that the
D recipient of the money in whose favour the payment is made is the right person to accept the payment. If payments are made without the proper authority and or mandate from its customer the bank is said to breach its duty of care to its customer. In *Redmond v. Allied Irish Bank Plc* [1987] FLR 307, Saville J said at p. 310:

E There is clear authority for the proposition that a bank owes its customer a duty to take reasonable care and skill in interpreting, ascertaining and acting in accordance with the instructions of his customer.

while in the celebrated case of *Bank of Montreal v. Dominion Gresham Guarantee And Casualty Co* [1930] AC 695 it was held that:

F The bankers had acted negligently in issuing the drafts without authority in accordance with the company's instructions, and were liable in damages in respect thereof; the frequent repetition of the same irregular procedure afforded no defence either by way of estoppel, ratification or otherwise.

G **[24]** Thus, a banker owes its customer a duty to take reasonable care and skill in acting in accordance with the customer's mandate. Not acting according to the customer's mandate would be an act of acting without authority of the customer. The position was firmly entrenched by the Federal Court in the case of *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1 as follows:

H In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders. See *Barclays Bank Plc v. Quincecare Ltd* [1992] 4 All ER 363.

I *The Mandate Of The Customer*

[25] The starting point is to determine the mandate or instructions or orders of the customer. There is no dispute that the customer had given its mandate to the first defendant. This was done in the document dated 9 May

2013 addressed to the first defendant informing that the sole operator of the account is Malcolm Fernandez. This mandate has not been revoked or varied since. The witnesses of the first defendant, SD1 and Mohd Azreennuddin Abd Halim (SD5), the officer whose duty was to seek verification of the RENTAS transfers in the impugned letters of instruction, confirmed the fact that Malcolm Fernandez is the sole operator of the account. SD1 readily conceded in cross-examination:

Q: Dan siapakah diberi kebenaran untuk mengendalikan akaun ini?

SD1: En Malcolm Fernandez

Q: Adakah dinyatakan apa-apa nama selain daripada En Malcolm Fernandez untuk kebenaran untuk mengendalikan akaun ini?

SD1: Tiada.

and by SD5 who testified that he had always called the plaintiff's office for Malcolm Fernandez to verify the transfers said in cross-examination:

Q: Dan boleh beritahu Mahkamah siapa pengelola akaun?

SD5: Pengelola akaun, Malcolm Fernandez.

Q: Malcolm Fernandez. Adakah Malcolm Fernandez memberi kebenaran kepada kamu untuk membuat pengesahan dengan Pn Ain?

SD5: Tidak.

Q: Adakah selain Malcolm Fernandez sebarang kebenaran diberi kepada pihak lain?

SD5: Tidak.

Q: Sebagai pegawai BSN tugas kamu adalah untuk bercakap dengan pengelola akaun. Setuju atau tidak?

SD5: Setuju.

[26] Apart from this express mandate the first defendant's own RENTAS procedure *vide* cl. 4 states as follows:

4. Maklum kepada Pelanggan/Pengelola Akaun bahawa amaun pindaan akan dikreditkan terus ke akaun berkenaan dan amaun Caj akan didebit daripada akaun pelanggan/organisasi.

[27] According to this clause, the first defendant has an obligation to inform the customer/operator of the account of the transfer. It is obvious that in the instant case since an operator of the account has been named by the plaintiff, which is a partnership, only the operator named by the partnership must be formed. The learned Sessions Court Judge failed to appreciate that SD5 called the plaintiff's office to verify from Malcolm Fernandez for each letter of instruction because the letter was the sole operator of the account.

Breach Of The Mandate And RENTAS Procedure

[28] The mandate of the customer as well as cl. 4 of the RENTAS procedure was clearly not complied with by the officers of the first defendant when allowing the RENTAS transfers to be made. SD5 agreed in cross-examination that he did not obtain any verification from the operator of the account. His reason for verifying with "Ain" was because Malcolm Fernandez was not in the office at the material time and the said "Ain" who answered his call said that she was authorised to make the verification. This is borne out by the following exchange in cross-examination between counsel and SD5.

> Q: Tidak. So mengapa tidak membuat pengesahan dengan pengelola akaun seperti yang diperuntukkan di bawah garis panduan BSN?
>
> SD5: Saya buat panggilan masa itu kepada C Sukumaran & Co. Tapi pengelola akaun tak ada kat office. Jadi yang angkat telefon pada masa itu adalah Puan Ain dan Puan Ain mengesahkan yang dia boleh membuat pengesahan.

[29] Notwithstanding the customer's written mandate and the first defendant own procedure on RENTAS transfers and the admissions of SD1 and SD5 in that the verification for the RENTAS transfers must be obtained from Malcolm Fernandez and no one else, the learned Sessions Court Judge held that no breach of the duty of care on part of the first defendant in obtaining verification from "Ain". The learned Sessions Court Judge was of the view that obtaining the verification from staff at the plaintiff's office was sufficient when the operator of the account is not in the office as reflected by the following paragraphs of his judgment:

> [87] Mahkamah mendapati SD5 pada awalnya ingin bercakap dengan SP3 bagi mengesahkan urus niaga, namun dimaklumkan oleh kakitangan bernama "Ain" SP3 tiada di pejabat. Setelah itu "Ain" telah mengesahkan kepada SD5 bahawa permohonan adalah sah.
>
> [88] Pada fikiran mahkamah adalah munasabah SD5 menerima pengesahan ini kerana kemudahan RENTAS secara asasnya disediakan untuk tujuan kecekapan. D1 tertakluk kepada denda jika prosesnya melebihi 30 minit. Adalah munasabah juga SP3 tiada di pejabat kerana dia adalah seorang peguam.
>
> [95] Pada fikiran mahkamah, sama ada "Ain" adalah SP2 atau D2 adalah tidak material. Yang penting ialah kedua-duanya adalah kakitangan plaintif.
>
> [96] Keterangan menunjukkan SD5 telah menghubungi kakitangan plaintif dan mendapat pengesahan daripada kakitangannya.
>
> [125] Dalam konteks fakta matrik kes sekarang, mahkamah berpuas hati D1 telah berhubung dengan agen atau kakitangan plaintif dan mendapati pengesahan adanya permohonan yang sah daripada plaintif. Justeru, mahkamah berpuas hati bahawa D1 tidak melanggar apa-apa prosedur RENTAS.

[129] Dapatan di atas sejajar dengan prinsip bahawa pengesahan atau verifikasi bagi sesuatu akaun koprat tidak semestinya melalui pengelola akaun, sebaliknya boleh juga melalui seorang wakil. Lihat *ML Breadworks* (*supra*):

> [63] It is apparent from the foregoing that no verification was undertaken with an authorised representative of the plaintiff or an authorised signatory by the defendant On the other hand, the plaintiff had not written to the defendant to advise of the new authorised representative.
>
> ...
>
> [65] In the instant case, I can find no such representation to have been made by the customer, *ie*, the plaintiff. The fact that the accountant verified the cheque is insufficient to amount to a representation creating an estoppel. The accountant was neither the authorised verifier on behalf of the plaintiff, nor an authorised signatory, according to the defendant's own records.

[30] It is clear that the learned Sessions Court Judge did not apply the correct principles on the banker's duty to comply with the customers mandate and also did not comply with the RENTAS procedure. Instead, the learned judge relied on the case of *ML Breadworks Sdn Bhd v. Malayan Banking Bhd* [2013] 1 CLJ 833 which he says is authority for the proposition that verification could be made by a representative of the operator of the account and not necessarily only by the operator of the account. This proposition if correct would be in conflict with the principles concerning the customer's mandate which I had set out above. Therefore, it behoves on me to now examine the case of *ML Breadworks Sdn Bhd* and identify its *ratio decidendi*.

[31] In *ML Breadworks Sdn Bhd*, the defendant bank was informed of the customer's mandate which was: (i) the signing conditions by the persons who were specifically named as authorised signatories of the plaintiff to operate its current account with the bank ("the authorised signatories"); and (ii) two other persons authorised to verify transactions as had been advised by the plaintiff to the defendant bank in its letter of 22 August 2007 ("authorised representatives"). The customer sued to recover monies debited from the plaintiff's current account with the defendant bank, in respect of one of its cheques which the plaintiff claimed was forged but which the defendant bank had honoured. The plaintiff relied on s. 24 of the BEA. The facts show that an accountant of the plaintiff had verified through deceit to an officer of the bank who had called to speak to the authorised representatives or the authorised signatories. The officer was informed that the authorised representatives had left the plaintiff's organisation while the authorised signatories were in Singapore. The accountant lied that he was authorised to verify the cheques. The officer of the defendant bank acted on the verification made by the accountant. It was established at the hearing that the accountant was the person who had forged the cheque.

[32] The issue before the court was whether there was a representation from the customer which would create an estoppel for the purposes of s. 24 of the BEA that the cheque was good for payment and protect the bank from liability. Nallini J referred to three cases. *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 where clear representations were made by way of express statements between the client and the banker which assisted in creating the estoppel. The second was *Brown v. Westminster Bank Ltd* [1964] 2 LLR 187 where the branch manager was given the impression by Brown that the cheques in issue were in fact genuine and at the second interview Brown was specifically asked by the branch manager to check her statements of account. The third case was *Tina Motors Pty Ltd v. Australia & New Zealand Banking Group Ltd* [1977] VR 205 where the bank when doubting the signatures on cheques presented by an employee of the customer and called a director of the customer who stated that if the employee was presenting a cheque, the signature was in order. In these three cases, the courts were of the view that a clear representation was made creating an estoppel in the bank's favour. Nallini J's decision was as follows:

> [63] *It is apparent from the foregoing that no verification was undertaken with an authorised representative of the plaintiff or an authorised signatory by the defendant*. On the other hand, the plaintiff had not written to the defendant to advise of the new authorised representative. Neither were the numbers of the authorised signatories in Singapore made available. Given this factual matrix can it be said that the accountant's fraudulent verification amounted to a representation giving rise to an estoppel under s. 24? *It is clear that such verification by the accountant cannot amount to a representation from the plaintiff sufficient to create an estoppel* under s. 24. ...
>
> [65] In the instant case, I can find no such representation to have been made by the customer, *ie*, the plaintiff. The fact that the accountant verified the cheque is insufficient to amount to a representation creating an estoppel. *The accountant was neither the authorised verifier on behalf of the plaintiff, nor an authorised signatory, according to the defendant's own records*. Unlike the *Tina Motors* case (above), none of the authorised signatories held out to the bank that this cheque was good for payment. In these circumstances, *I find that there was no representation made in the instant case by the plaintiff warranting the existence or creation of an estoppel as envisaged under s. 24 of the Bills of Exchange Act* which precludes the plaintiff from recovering the monies erroneously or wrongfully paid out by the defendant.
>
> (emphasis added)

[33] The *ratio decidendi* of the case is that for the purposes of s. 24 of the BEA, the representation to amount to effective estoppel must be made by the person authorised according to the customer's mandate. In *ML Breadworks Sdn Bhd*, there were four authorised signatories and two authorised representatives who could have verified whether the cheque was good for payment. In that case, since the verification was sought from the accountant

who was neither an authorised signatory nor authorised representative the defendant bank was precluded from relying on estoppel under s. 24 of the BEA.

[34] In the circumstances, I hold that the proposition relied on by the learned Sessions Court Judge said emanating from *ML Breadworks Sdn Bhd* not correct. The case, in fact, assists the plaintiff. "Ain" in the instant appeal is in the same position as the "accountant" in the above case. The persons who can verify cheques or transactions apart from the authorised signatories or operators of the account can be other persons so long as these persons are expressly named as authorised representatives in the customer's mandate. Thus, any verification obtained against the customer's mandate is meaningless.

[35] In the instant case, "Ain" is not an authorised representative. The plaintiff did not authorise her for anything. The first defendant acted to its own detriment by relying on verification made by an unauthorised person although that person may be a staff or even a partner of the plaintiff's organisation.

[36] The learned Sessions Court Judge in his judgment also held that from the series of RENTAS transfers the plaintiff had represented to the first defendant that "Ain" is authorised to act for the plaintiff as reflected in the following paragraphs of his judgment:

> [130] Mahkamah mendapati daripada siri arahan RENTAS plaintiff telah merepresentasikan kepada D1 bahawa "Ain" boleh bertindak bagi pihak plaintif.
>
> [131] Mengikut undang-undang, representasi boleh dibuat secara bertulis atau secara tersirat dalam bentuk kelakuan. Lihat penghakiman dalam *Brown v. Westminister Bank Ltd* [1964] 1 LLR 187.

[37] With respect, I disagree. The "representation" the first defendant seeks to establish is to establish the exception to absolute liability under s. 24 of the BEA. But the plaintiff is not relying on s. 24 of the BEA. It is relying on the tort of negligence where the duty is on the first defendant to verify each letter of instruction for the RENTAS transfer with the operator of the account before executing the transfer. This, the first defendant failed to do as it turned to "Ain", a person not authorised by the plaintiff to verify the RENTAS transfer sought in each letter of instruction for the RENTAS transfer. The conduct of the first defendant is a violation of the customer's mandate and cl. 4 of the RENTAS procedure.

[38] Further, *Brown v. Westminster Bank Ltd* [1964] 2 LLR 187 does not assist the first defendant. There, the bank manager was given the impression by Brown that the cheques in issue were in fact genuine. At a second interview, Brown was specifically asked by the bank manager to check her statements of account. In these circumstances, the court held that the

customer or Brown was not entitled to recover the monies on the honoured cheques because an estoppel in favour of the bank had been created by the customer's failure to respond after checking the statement of accounts. The customer's silence in such circumstances was held to amount to a representation that the cheques were genuine. In the instant appeal, the first defendant did not even contact the authorised signatory or operator of the account as was done in *Brown's* case. Thus, there can be no representation by the conduct of keeping silent or any other conduct.

[39] With regard to *Leolaris (M) Sdn Bhd v. RHB Bank Bhd* [2009] 10 CLJ 248, it suffices to say that the case was decided on its peculiar facts. There at the opening of the current account it was represented and agreed that the plaintiff's employee Juliana Siew ("Siew") would be the plaintiff's contact/liaison person as shown on the "specimen card". Thus, although not named as an authorised representative, Siew was named as the contact person and had liaised with the defendant bank on all banking matters since the opening of the account. Ramly Ali J held as follows:

> [10] It is not disputed that the contact person named in the specimen card ("P4") was Siew. At all material times, the defendant has never received any other letter from the plaintiff appointing and naming the authorised representative. DW2 testified that if there were any banking matters which requires the confirmation or verification of the plaintiff, the bank would call and liaise with Siew, no one else.
>
> [11] As such, in the absence of a such letter from the plaintiff and further from the conduct of Siew, it was reasonable for the defendant to infer impliedly that Siew was the authorised representative of the plaintiff in relation to banking matters or in respect of the operation of the current account with the defendant.

Decision On Negligence

[40] I hold that the first defendant had failed to comply with the mandate of its customer. The first defendant is under a strict duty to comply with the terms of the mandate given to it by the plaintiff. In the instant appeal, only Malcolm Fernandez had the authority to make the verification for the RENTAS transfers. This fact is conceded by SD1, SD5 and also Kamaziah binti Mohd Kassim (SD3), the officer who makes approval 2 for transfers under RENTAS as follows:

> Q: Ya, ok. Dan daripada rekod-rekod yang Puan telah tinjau, ada sebarang pemberian kuasa kepada Pn Ain untuk membuat sebarang, sebarang pindahan wang daripada akaun C. Sukumaran & Co?
>
> SD3: Tiada.
>
> Q: Puan bersetuju, sebarang pengesahan daripada Puan Ain tidak merupakan kebenaran oleh Plaintif untuk membuat sebarang pemindahan wang daripada akaun Plaintif?
>
> SD3: Ya.

[41] The first defendant would be in breach of its duty if it did not seek verification from the authorised person. Seeking verification from any other person including the other partners or staff is against the customer's mandate. The mandate was created to protect the plaintiff even from forgery and fraud committed by persons within the organisation. Had the verification been sought from the authorised person as mandated the fraud perpetrated by the second defendant would have been discovered. Any prudent and reasonable banker would have complied with the mandate of its customer. Thus, the finding of no breach of the duty of care by the learned Sessions Court Judge when the mandate of the customer was not complied with is plainly wrong and warrants appellate interference.

[42] The first defendant breached its duty of care in carrying out the customer's mandate. In such circumstances, the first defendant is negligent in transferring the funds to the account of the second defendant who had no right to receive the funds. The decision of the learned Sessions Court Judge is accordingly set aside. The first defendant is held negligent for transferring the monies against the customer's mandate and its own RENTAS procedures. This brings me to the issue of contributory negligence.

Contributory Negligence

[43] In my view, from the totality of the evidence, the plaintiff, on a balance of probabilities is liable for failing to take care so as to avoid damage to itself. Had reasonable steps been taken as a prudent and cautious employer, such as auditing its accounts or having a proper system concerning its bank accounts and proper supervision of the second defendant the plaintiff would have at an early stage detected the unauthorised withdrawals or fraud committed by the second defendant. The fact that the fraud went undetected for ten months speaks for itself. The account was also not a passive account as the plaintiff is alleging. The evidence shows that apart from the RENTAS transfers monies were also credited into the account on a regular basis.

[44] I, therefore, find the plaintiff contributory negligent. The plaintiff appeared to have been rather lax in exercising its supervision in respect of its financial affairs. In my considered opinion, the defendant has proven on a balance of probabilities the defence of contributory negligence. I, therefore, apportion liability between the parties on a 30:70 basis.

Whether Exception In Section 73A Of The BEA Applies?

[45] In my judgment on its true interpretation, s. 73A of the BEA applies only in the instance of a cheque that is forged and therefore the protection does not avail to the first defendant. In the circumstances, the finding of the learned Sessions Court Judge that the protection provided by s. 73A of the BEA is applicable is plainly wrong as a result of misdirection on the applicable law.

[46] To appreciate s. 73A of the BEA, I begin with the position at common law which is still applicable and appears in the form of s. 24 of the BEA.

[47] At the common law, a bank which pays out on a forged instrument drawn on its customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. However, at common law the customer is estopped from relying on forgery if one of the following instances is applicable: (i) the manner in which the customer draws a cheque may facilitate fraud or forgery *(London Joint Stock Bank Ltd v. Macmillan* [1918] AC 777); and (ii) the customer fails to inform the bank as soon as the customer is aware of any forgery of a cheque drawn on the account *(Greenwood v. Martins Bank Ltd* [1993] AC 51). Otherwise, the bank cannot escape liability, (see Supreme Court in *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 following Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80; and Court of Appeal in *Prima Nova Sdn Bhd v. Affin Bank Bhd* [2014] 9 CLJ 442).

[48] Our s. 24 of the BEA codified the common law position in the following words:

> Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall effect the ratification of an unauthorised signature not amounting to a forgery.

[49] The words "unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority" encapsulates the doctrine of estoppel which would include the instances of the common law exceptions stated in the *Macmillan* and *Greenwood* cases (see *Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337). The interpretation of s. 24 of the BEA given by the Supreme Court in *Tai Soon Heng Construction Sdn Bhd* (*supra*) is as follows:

> Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment.

[50] This position stood until s. 73A of the BEA was inserted by way of an amendment in 1998. The section provides as follows:

> Notwithstanding s. 24, where a **signature on a cheque** is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith **pays the cheque or takes the cheque for value**.
>
> (emphasis added)

[51] Section 73A of the BEA has provided a further exception which involves forged cheques. The section provides a complete defence if the bank proves that the customer, "negligently contributed to the forgery of the signature on a cheque" or "the making of the unauthorised signature on a cheque" provided that the bank in making the payment on such cheque or takes such cheque for value has acted in good faith. In other words, where the person whose signature on a cheque is alleged to be forged is found to have knowingly or negligently contributed to the act of forgery, the cheque will be deemed to have been made by him and the bank will not have to make good to that person, any payment made out on the said cheque.

[52] The question in the instant case is whether the first defendant can rely on the protection provided by s. 73A of the BEA. The section clearly refers to "cheques". The letter of instruction in the present appeal for each RENTAS transfer is not a cheque. Different considerations apply to a cheque. A cheque must be honoured upon presentation unless some doubt arises for which queries are made with the customer's authorised signatory or authorised representative. On the other hand, for a RENTAS transfer, verification must be sought from the authorised operator of the account.

[53] Section 24 speaks of a bill of exchange while s. 73A specifically speaks of "cheques" which is a specie of a bill of exchange. A "bill of exchange" is defined in sub-s. 3(1) of Part II of the BEA as:

> A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer.

while a "cheque" is defined in sub-s. 73(1) in Part III of the BEA as:

> A cheque is a bill of exchange drawn on a banker payable on demand.

[54] Section 73A of the BEA is a very specific provision. It was clearly intended to apply only to cheques. If it was meant to be wider than "cheques" the legislature would have simply amended s. 24 of the BEA

instead of introducing s. 73A. The intention of s. 73A of the BEA was to provide absolute protection against liability in the instance of paying out on cheques in good faith which contained forged signatures.

[55] The cases cited by the first defendant are distinguishable as they all refer to forgery involving cheques and whether the protection under s. 73A of the BEA is applicable. The specific issue in this case did not arise in those cases: whether s. 73A of the BEA applies to bills of exchange or only to cheques? Further the Court of Appeal case of *RHB Bank v. L & R Holdings Sdn Bhd & Anor* [2011] 4 CLJ 369 was not even a case interpreting s. 73A of the BEA. It was an appeal by the defendant bank against the injunction that was granted to restrain the defendant bank from enforcing securities pledged by the plaintiff to the defendant bank.

[56] Since, s. 73A of the BEA was wrongly held applicable, it follows that the finding that the first defendant was protected by the section cannot be justified in law. In the circumstances, appellate intervention is warranted.

Conclusion

[57] For the above reasons, the appeal is allowed. The decision of the lower court is set aside. The plaintiff has proved its case in negligence and for the reasons stated is contributory negligent for its losses.